

THE DEPENDENCE OF LIBERTARIANISM ON THE
NOTION OF SOVEREIGNTY:
REJOINDER TO MORTON

ABSTRACT: *G. E. Morton tries to defend libertarianism against my claim that it relies on an implausible secularization of ideas of divine sovereignty. But it is not true, as he claims, that morality itself entails human sovereignty: witness the moral theories of divine-command theorists and philosophical consequentialists. Nor is it true that sovereignty can be conceptually transferred from God to equal human individuals, since they would have no legitimate way to legislate over each other, short of a unanimous “general will.” Nor, finally, does the idea of first possession rescue private property rights, since it is as applicable to animals and children as to adult human beings.*

In my paper “Libertarian Natural Rights” (Van Duffel 2004a), I argued that neither freedom as nonconstraint of options, nor freedom to do what one wants, is a plausible basis for libertarian natural-rights claims. Instead, I proposed the notion of natural dominion as a more promising basis for libertarianism. However, I argued, the ascription of natural dominion (or sovereignty) to people fails to provide reasons for them to respect each other’s sovereignty. A theory that takes natural dominion as its basis can therefore justify only a Hobbesian state of nature. A libertarian theory that relies (implicitly or explicitly) on the idea that people are natural sovereigns, but also claims that people have duties to respect each other’s property, must be incoherent.

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Critical Review 21(1): 117–124
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ISSN 0891-3811 print, 1933-8007 online
DOI: 10.1080/08913810902812198

G. E. Morton states two objections. The first objection is that my thesis does not undermine libertarianism because, contrary to what I suggested, property rights, as libertarians understand them, are not rooted in *dominium* but in first possession. The second objection is a sort of *reductio ad absurdum* of my claim that conceiving of people as natural sovereigns does not allow us to infer that they have obligations to respect each other's sovereignty. My claim, Morton says, calls into question the whole moral enterprise. If my claim goes through, it "is not libertarian natural rights that are incoherent, but morality itself."

Let me address the second objection first. According to Morton, "the thrust of describing someone as a 'sovereign' is to establish, at least in large part, that he or she is a moral agent," because moral agency is usually considered to be a matter of individual sovereignty. If "sovereignty" indeed equals "moral agency," my argument would presumably show that no moral agent can promulgate or enforce moral laws (at least not laws that bind other moral agents). But, says Morton, "if Kant and most other moral theorists are right, then morality is precisely those universal rules by which moral agents bind themselves and all other agents."

For the sake of argument, I will divide Morton's argument here into two parts: (1) "Moral agency" is equivalent to "sovereignty"; thus, we cannot possibly conceive of ourselves as moral agents unless we acknowledge that we are sovereign beings.¹ (2) If we believe moral rules to have existence, we must also hold that moral agents have the normative power to legislate moral rules, because these rules can be brought into existence only by the agents who mutually bind themselves by them.

The Non-Obviousness of Kantianism

The view expressed in Morton's first claim is clearly wrong. Our common-sense conception of moral agency does not imply that we conceive of ourselves as sovereign beings. To appreciate this, consider a community in which everyone believes that moral rules are laid down by God. Certainly these people consider each other to be moral agents. They all have the ability to obey (or disobey) moral rules. They hold each other responsible for failures to behave morally, etc. None of these people, however, are moral agents in the sense in which Morton defines moral agency—i.e., in terms of the ability to promulgate moral obligations. These people do not consider themselves to be the authors of any

moral law. Even if we imagine Kant to be claiming that these people are simply mistaken about the origin of the moral law (such that, contrary to what they believe, they have promulgated the law themselves), we cannot infer from this that the conception that these people have of each other fails as a conception of moral agency.

Similarly, like these religious people, most of us do not believe that the only moral rules that we obey are rules that we have brought into existence ourselves. Most of the duties that we imagine ourselves as having—duties to be honest, to respect each other, not to steal, not to hurt each other, etc.—did not come into existence because we decided to adopt them. They were there all along, even before anyone ever imagined that they were. Consider the right of women to equal treatment: if you believe that women have such a right, like most of us nowadays do, then you certainly also believe that women had this moral right long before anyone imagined that they had it, even if such a right had never been thought of.² Or, if you are a libertarian, you will not agree that the supposed morality of taxing people depends on whether anyone has rejected the idea in moral terms. Even in an imaginary age when nobody thought taxation was wrong, libertarians will say, it was nonetheless wrong (people merely didn't realize that it was). In this sense, not even libertarians believe that moral rules are legislated.

Morton's second claim can be interpreted to the effect that most moral theorists subscribe to moral constructivism. Whatever the appeal of moral constructivism as a position may be, it is certainly not true that most moral theorists subscribe to it. Not just divine-command or ideal-spectator theorists, but most consequentialists (utilitarians and others), as well as many adherents of deontological moral theories, would not consider themselves to be moral constructivists.

Yet even if we would grant that most moral theorists subscribed to constructivism, this would not contradict my claim that if human beings are all equally sovereign, they could not have obligations to respect each other's sovereignty. The reason is that a constructivist could not possibly hold individual human beings to be sovereigns in the relevant sense. A sovereign exercises normative control over a certain domain: she is the author of the laws that apply in that domain. But if moral laws derive from a sovereign, how can equally sovereign human beings be that sovereign—and thus be the author of moral rules that bind all other human beings? The ability to bind all other human beings would imply either that all other human beings are part of this sovereign's domain, or that together

they constitute a kind of “general will” that is capable of binding them all. But this, I submit, precludes the individuals themselves from being sovereign.

Kant—or Rousseau?

Morton thinks that there is nothing in the concept that precludes sovereignty from being distributed over multiple agents, but there certainly is, at least if this distribution is supposed to leave the sovereignty of the individuals intact. The problem is that the decisions of a sovereign must have normative consequences. But unless the agents that constitute a collective sovereign are always in agreement, there will be cases in which the will of an individual fails to be normatively effective.

Another way to see the problem is this: Imagine a state of nature in which hitherto no moral rules existed, and human beings are supposed to decide which moral rules to establish. Should these people disagree on which moral rules to adopt, how are they to arrive at moral rules at all? If certain people think taxation is wrong, but most other people think otherwise, how are they to arrive at a decision?

A libertarian may want to take recourse in the idea that no one may be forced into compliance with a rule that he or she hasn’t agreed to. But if moral rules are promulgated by a sovereign (who, in this case, is not any individual, but is a community of beings that together constitute a sovereign on another level), such a move is unavailable. For in the absence of a decision by the community of people that constitute the sovereign, no rule that one of these people propose has any moral standing. The problem is that there will be no moral standards *at all* until everyone has come to an agreement. Put more generally, the point is that the rules that determine the correct decision procedure are also moral rules, and certainly these cannot all be dependent on any decision of any human being or group of human beings.

Of course, this analysis seems to fly in the face of Kant’s claim that the idea of the will of every rational being as a universally legislating will is the supreme principle of morality—that all rational beings are sovereigns in the kingdom of ends. Kant indeed held that the moral law is legislated by a rational will, and that we are bound only to those laws that we have given. But Kant was also committed to moral objectivity. He thought moral requirements not only universally valid, but also in some sense

necessary.³ Thus, Patrick Kain (2004) has recently shown that Kant, contrary to what other interpreters have thought, did not endorse a constructivist conception of morality. Kant distinguished between legislating a law and being the author of a law. “No one, not even God,” according to Kant, “is the author of moral laws, since they do not spring from the will, but are practically necessary.”⁴ The reason for Kant’s insistence on the independence of the moral law from any author is that the notion of authorship threatened the categorical necessity of our moral obligations. In other words, instead of endorsing a constructivist conception of morality, Kant thought that a law that has an author, whether divine or human, could not possibly be a moral law that could ground moral obligations.

First Possession Does Not Confer Property Rights

I take it that no further argument is needed to show that my critique of the basis of libertarian natural rights does not undermine the possibility of morality per se, and that this objection therefore is unfounded. Let me now address Morton’s other objection: the claim that because I have mischaracterized the basis of (libertarian) natural rights, my criticism at best fells a straw man, not libertarianism.

Surprisingly, this claim is not so much argued for as merely posited. Morton ignores my arguments to the effect that the notion of natural dominion does a better job than the notion of freedom in explaining the implicit distinctions that are drawn in arguments for libertarian rights. Instead he proposes another basis for natural rights (first possession), without caring to explain why this notion would better accommodate intuitions underlying libertarian natural-rights theories than does the notion of natural dominion. I do not think such an explanation could be given, since the notion of first possession is so obviously defective that it cannot possibly ground any serious theory of natural rights.

The notion of natural dominion is closely associated with the notion of free will, and this explains why people have thought that only human beings can own something: like God, human beings have free will (at least on some accounts). But first possession, conceived (to quote Morton) as a “historical relationship” between possessor and thing, does not share this quality. Why can’t a horse take possession of the meadow on which it was the first to graze, or a fox of the hole in which it is the

first to live? These pieces of land confer benefit on the animals that first use them as much as they may benefit human beings. Similarly, most libertarians would not grant full property rights to small children, but first possession would seem to entail that a child's possession of something results in a natural property right, as it supposedly does when the possessor is an adult human being.

Even for an adult human being, simply having been somewhere, or having held something, does not suffice to appropriate something. Otherwise the first discoverers would have acquired all the till-then unowned lands that they passed through. One has to "take possession" of something, i.e., one has to form an intention to appropriate it and somehow make this intention public. This shows that possession, as a historical relationship, is not a sufficient basis for the establishment of a property right.⁵

Acknowledging the notion of dominion as the basis of libertarian thinking also makes it possible to understand why only the interference of other human beings is seen by libertarians as an intrusion on a person's freedom (or an encroachment on her rights). Since only other human beings can follow norms, the law of a sovereign can apply only to other human beings. "First possession" is unhelpful in this respect, too. If I am wronged when I am deprived of a good that I possessed first and want to hold on to, then a storm that deprives me of the roof over my house wrongs me. Similarly some acts, while they do not deprive anyone of a good, may nevertheless be considered as infringements of a right. Suppose that you own a forest in which a rare mushroom grows, that you are very fond of this mushroom, and therefore that you forbid anyone to walk in the forest, because you are afraid that someone might destroy it. However, I am an environmentalist who from time to time sneaks into the forest because I know this mushroom needs some protection. By entering the forest, I am violating a specific order of yours (because I failed to convince you that the mushroom needs protection). By protecting the mushroom, I am actually protecting your interest in its continued existence, but I am nevertheless violating your property right. When we acknowledge that such rights are based in dominion, we can see why this is the case. We can also see in what sense libertarian natural rights are different from rights that protect interests—since the protection of interests could easily justify, say, paternalistic infringements upon libertarian property rights, if this would achieve the protection of the property holders' interests.

The notion of first possession is also liable to an objection similar to the one that Nozick formulated against the Lockean labor theory of property mentioned by Morton. If I am the first to arrive on an island, do I possess the whole island, or merely the parts of it on which I have walked? Invoking the criterion of interest, or "benefit," does not help, because it gives rise to the objection that something can be possessed only on condition that it confers a benefit on its possessor, and perhaps also as long as it continues to do so. But the more important problem with introducing the notion of benefit in a historical argument of the sort that Morton is trying to defend is that it would seem incumbent on such a theory to claim that something did not confer any benefit on anyone else before it was appropriated for the first time. As anyone familiar with early discussions of property rights will realize, this claim relies for its plausibility on a collapse of the distinction between use and property. Some people have argued (unsuccessfully, I think) that such a distinction cannot be maintained in respect of consumables, but even if we would grant this, it is certainly possible to distinguish between mere use and ownership in respect to land.⁶ Once you allow for this distinction, it becomes impossible to claim, as Morton does, that any appropriation of something previously unowned wrongs no one because the good benefited no one. Moreover, the fact that something is commonly available for use could in itself be considered a benefit for those that may have access to it in the future, as long as it is not individually appropriated by someone else. So even if the first person to use the thing is not, at the moment of appropriation, inhibiting its use by someone else (because no one is using the thing right now), excluding others from any future use does deprive them from a benefit that they otherwise might have had.⁷

Thus, I am not convinced by the claim that my paper has misrepresented the basis of libertarian natural rights. Morton has certainly not given any compelling arguments to show that it has. Morton's alternative, on the other hand, is arguably even more problematic as a basis for natural rights than the different notions of freedom that I considered in my paper.

NOTES

1. Morton's claims are irritatingly imprecise. On the one hand, he sometimes suggests that sovereigns are a subclass of moral agents: "If a 'sovereign' is merely a moral agent to whom a certain realm of autonomy attaches. . . ." On the other hand, he writes as if moral agents are sovereign because they necessarily bind each

other and themselves by universal rules. His argument, however, seems to require the latter claim.

2. This may sound overconfident, as some relativist will deny this to be the case. For a defense, see Van Duffel 2004b.
3. See Reath 1994 for an attempt to reduce the tension between the two.
4. Kant, "Moralphilosophie Collins," quoted in Kain 2004, 276. The distinction between legislator and author is made in the *Metaphysik der Sitten* (6.227). See also Kain 2004, 266.
5. Morton doesn't seem to argue this, since he explicitly says that something has to ennoble one's possession of something before we can say that it is wrong to take it from her. But the argument already presupposes property rights, since it relies on an implicit distinction between a good that is in somebody's possession, and other goods that are not (see below).
6. For an excellent discussion, see Kilcullen 2000; see also Mäkinen 2001 and 2003 and Dawson 1983.
7. My apologies to the reader to whom these arguments sound all too familiar, but some libertarians seem to have a strange resistance to them.

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